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IN THE

Supreme Court of the United States

No. 128

CITIZENS UTILITIES COMPANY,
Petitioner,

VS.

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY AND THIRD NATIONAL BANK AND TRUST COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY, file this brief in opposition.

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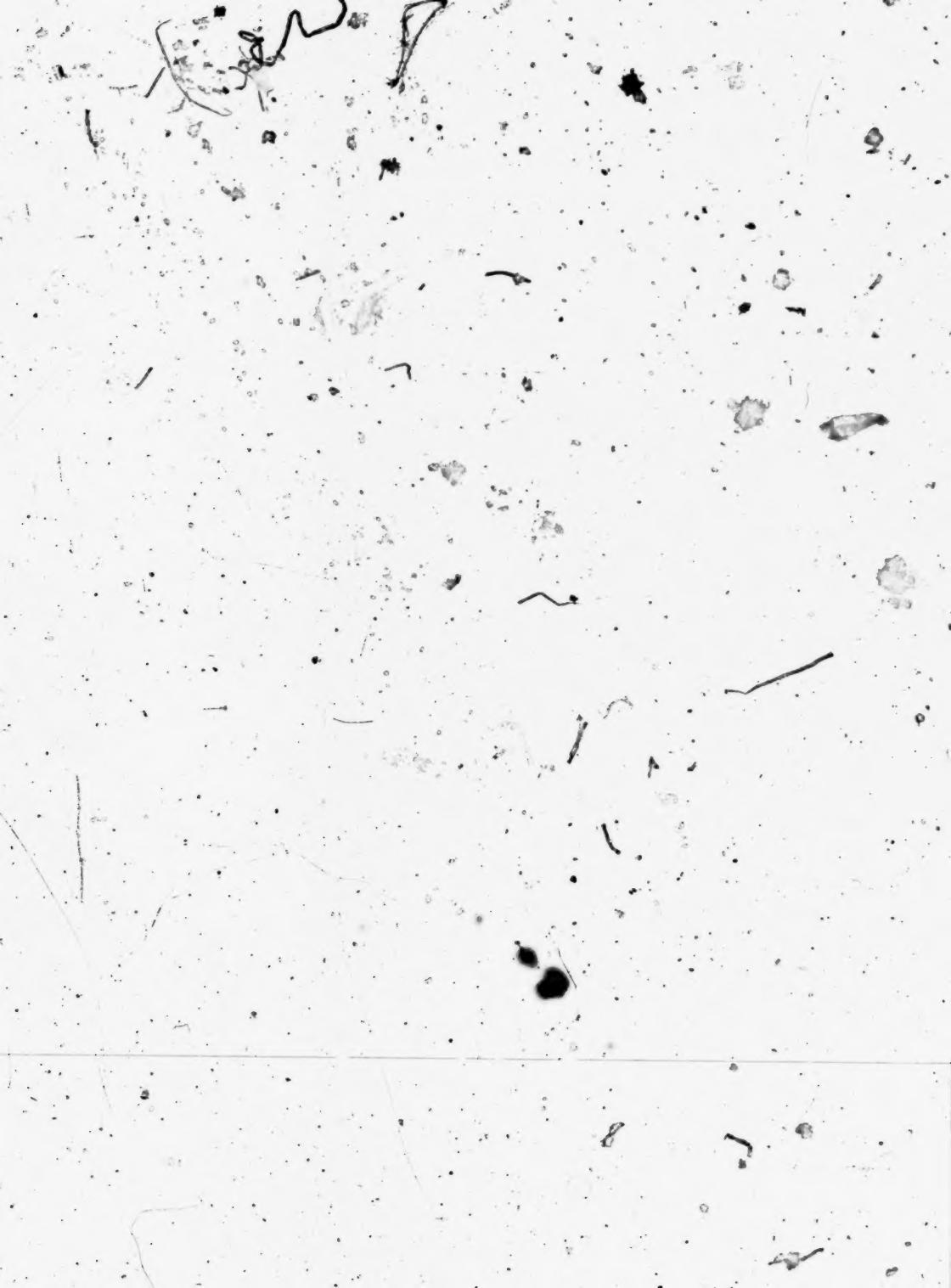

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 428

CITIZENS UTILITIES COMPANY,
Petitioner.

v.

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY AND THE THIRD NATIONAL BANK AND TRUST COMPANY,
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BRIEF OF RESPONDENTS

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY AND THIRD NATIONAL BANK & TRUST COMPANY file this brief in opposition to the Petition of CITIZENS UTILITIES COMPANY for Writ of Certiorari to the United States Court of Appeals For The Second Circuit.

The petition fails to mention the order of the Circuit Court of Appeals dismissing the petition of Citizens Utilities Company for review of the order of the Federal Power Commission November 2, 1961, and reported in 295 F. 2d 950, Respondents' Appendix in the Circuit Court of

Appeals page 53a. This appendix will hereinafter be designated as "Rs' Appx."

STATUTES INVOLVED

In addition to the Statutes set forth in the petitioner's appendices p. 29a and in its appendix before the Circuit Court of Appeals (R. 143a-145a) the respondents rely upon §21 of the Federal Power Act, 16 U.S.C.A. §814, (Rs' Appx. 8a) and 30 V.S.A. §115, (Rs' Appx. 7a). The Vermont Statutes of 1947 §§9331-9333 (R. 143a) are now known and generally referred to in the relevant court opinions and elsewhere as 30 V.S.A. §§109-111.

QUESTIONS PRESENTED

This case is back in this Court on a second petition for certiorari by Citizens. Much that was said in respondents' brief on the first petition is applicable here, particularly upon the point that there is no Federal question here involved or any question of importance or of more than local and not Federal import. The questions involved here are not unlike those involved in the former petition.

The similarity between the artificial questions framed by petitioner in its former petition and those here presented on page 3 of the petition can not be obscured. Compare the first and principal "question" set forth in the former petition to review the decision of the Vermont Supreme Court in *Citizens Utilities Company* v. *Prouty, et als*, 122 Vt. 443, cert. denied; 369 U. S. 838 (R. 119a; 131a) viz:

> "1. Does an order by the Federal Power Commission, without any other or further action on its part, directing a public service corporation, legally existing and operating under state authority, to apply for a license from the Federal Power Commission, in and of itself oust; on the ground of pre-emption, the Vermont Public Service Commission of jurisdiction to continue a condemnation proceeding then validly pending before it?"

Just as petitioner then claimed that the Vermont Supreme Court had given a retroactive or *ex post facto* effect to the exercise of jurisdiction by the Federal Power Commission, so now Citizens claims the Federal District Court and the Court of Appeals have made the exercise of jurisdiction by the Federal Power Commission retroactive, and that such holdings present a federal question of "far reaching importance." This is a wholly false issue. Nothing could be farther from the truth. All that these courts have ruled is that, consistently with the Federal Power Act, by Vermont law; both statutory and court decided, the state Public Service Commission did not have jurisdiction with respect to petitioner's project, because it involves navigable waters of the United States and petitioner lacked the license from the Federal Power Commission necessary for its maintenance and operation.

It will be helpful to keep in mind the geographical conditions which are involved.

Lake Memphramagog is a large international lake crossing the boundary of the United States and Canada. Clyde River, located in Vermont, is a principal tributary having a large flow of water so that it affects Lake Memphramagog. Its flow is sufficiently great to cause Citizens to own and control several dams and electric power stations upon it. (Appendix B 17a-18a and 279 F. 2d 1). These are facts of which the courts take judicial notice. *Boutwell* v. *Champlain Realty Co.*, 89 Vt. 80, 86. Therefore, Clyde River is to be classified as navigable waters the same as the Connecticut River and many other rivers throughout the United States, several of which have been involved in litigation in the United States Supreme Court.

It was not necessary to have them specifically declared navigable waters by Congress. By the Federal Power Act, as amended in 1930, they became subject to the exclusive jurisdiction of the Federal Power Commission. Action by that Commission was not necessary to make Lake Memphramagog or Clyde River subject to its jurisdiction. Confirmation of Clyde River being navigable waters is found in decisions of the Circuit Court of Appeals, the United States District Court, the Vermont Supreme Court and in pro-

ceedings resulting in orders of the Federal Power Commission. They are referred to at pages 1 and 2 of the petition. None of these limit the time as to navigability and it is a matter of common knowledge to be judicially noticed that there has been no substantial change in the conditions of Clyde River for many years.

Therefore, the questions presented by I(a) and I(b) on page 3 of the petition, which are based wholly on retroactivity, do not exist.

The word "retroactively" used by Citizens, or any other similar word, does not appear in the opinions of the Circuit Court of Appeals, or the United States District Court, or the Vermont Supreme Court.

Citizens is raising fictitious questions not supported by the record and its argument therefore is fallacious throughout.

The issues are not those propounded in the petition, pages 3 and 4.

As the record clearly shows and as will be demonstrated in this brief the questions set forth on page 3 of the petition never arose and have no proper place in this case.

The *only* issue is simply:

Was the Circuit Court of Appeals correct in deciding that as a matter of *local* law the State Public Service Commission did not have jurisdiction to hear and decide the proceeding brought by petitioner to condemn respondents' property upon a navigable river, when petitioner had no license or other authorization so to do?

The decision of the Circuit Court of Appeals is fully supported by:

(1) Vermont authorities holding that the Federal Power Act preempted the field of hydro-electric development upon a navigable river, in accordance with *First Iowa Hydro-Electric Corp.* v. *Federal Power Commission*, 328 U. S. 152, AND

(2) Vermont Statutes under which the state commission lacked authority to entertain Citizens' petition for condemnation.

STATEMENT

The "statement" in the petition for writ of *certiorari* contains certain assertions which should be corrected and omits much that is important in the opinions and holdings of the courts below and in related cases. Thus the District Court based its opinion that the Public Service Commission never had condemnation jurisdiction in respect to respondents' riparian land, *not* upon the determination of the Federal Power Commission that the Clyde River was navigable, but upon the *fact* that "the Clyde River is navigable water, and the Federal Power Commission has had exclusive jurisdiction over it, certainly since the creation of the Federal Power Commission." (Rec. page 532; R. 84a). Moreover, the fact of navigability and the right of Congress to exercise control over the entire river is not an issue here.

Neither did the district judge interpret (as Petition page 4 asserts) a prior holding of the Vermont Supreme Court in a companion action that the Public Service Commission's jurisdiction was "ousted" subsequent to assumption of jurisdiction by the Federal Power Commission. There is *no such holding*. In substance, all that the Vermont Supreme Court decided was that in the absence of a license from the Federal Power Commission the State Public Service Commission had no jurisdiction of the eminent domain proceedings. The holding is in these words:

> "Without the license the Public Service Commission lacks the proof of authorization of the project required by 30 V. S. A. §111 (1) which is necessary for jurisdiction of the eminent domain proceedings brought by the petitioner.
>
> "The judgment order of the Public Service Commission, dated Nov. 10, 1960, purporting to authorize the petitioner, Citizens Utility Company to condemn and to acquire the petitionees' property upon the payment of $95,000.00 is reversed for want of jurisdiction."

Citizens Utilities Company v. *Prouty, et als*, 122 Vt. 443, 452-453, 176 A. 2d 751; R. 131a.

The Vermont Supreme Court in Re *Bellows Falls Hydro-Electric Corp.*, 114 Vt. 443 never said that "*after* the Federal Power Commission had assumed jurisdiction * * * * "it had thereby * * * preempted the field" as Citizens erroneously states at page 14 of its present petition. On the contrary, that opinion makes no reference whatever to the Federal Power Commission, or to the Commission's having assumed jurisdiction; instead it treats the navigability of the Connecticut River as an unquestioned fact. Indeed it could not do otherwise in view of the language of its former opinion in *Boutwell* v. *Champlain Realty Co.*, 89 Vt. 80, 86, 94 Atl. 108, (1915) where the Vermont court took judicial notice of the navigability of the Connecticut River in these words:

> "One of the chief geographical features of the State is, that its eastern border is washed by the Connecticut River; and it is a matter of historical knowledge that the Connecticut has always been a public highway upon which, in early times, a portion of the merchandise and productions of the eastern part of the State, including lumber, were transported in boats or otherwise; and it is of common knowledge that in more recent times it has been used as a great public highway for the floating of logs to places further south in this State, and to places in the State of Massachusetts. These facts, therefore, are judicially noticed."

It is thus apparent that it was the fact of navigability and not that the Federal Power Commission recognized such navigability, which has prompted the Vermont Supreme Court twice to hold that the State Public Service Commission lacked jurisdiction with respect to navigable waters of the United States.

In its brief, Petitioner improperly refers to its contractual obligation as a "penalty" or "forfeiture," although no such point was ever raised or briefed in any of the courts below. On the contrary, the question of penalty or forfeiture is definitely excluded by petitioner's answer in the District Court wherein it designated the provision of the lease,

(which it now calls a penalty clause) as an "alternate right" available to it in these words:

> "18. Admits the allegations in paragraph numbered '18' of the Complaints; and avers that the right to acquire said plaintiffs' realty for the sum of three hundred thousand dollars is not obligatory upon this defendant, but is an alternate right which this defendant has not exercised, all as more particularly appears by the precise terms of said Agreement, of which a copy is attached." (R. 17a.)

SUMMARY

Consistently with the Federal Power Act, as interpreted in the First Iowa Case, the Vermont Courts, as a matter of local law, recognize that the regulation of navigable waters of the United States and their principal tributaries has been preempted by federal authority. Consequently, they have held (1) that the State Public Service Commission had no authority to issue a state permit for the development of a hydro-electric plant upon a navigable river, and (2) in a companion case to that presently before this court, that the state commission had no jurisdiction of a condemnation petition involving riparian lands upon navigable streams brought by a would-be condemnor, lacking a license from the Federal Power Commission for the operation and maintenance of its project.

The statutory law of Vermont recognizes the preemptive and paramount authority of the Federal Power Commission in all condemnation cases involving navigable waters, in that it requires either a state certificate of public good authorizing the project or a license from the Federal Power Commission. While obviously they are not interchangeable and a state certificate of public good is not a substitute for, or the equivalent of, a license from the Federal Power Commission, the important point as respects petitioner's lack of authority is that is possessed neither one nor the other. At all times here material it has had *no* state certificate of public good and no license from the

Federal Power Commission. These facts are undisputed and *res adjudicata*.

Notwithstanding certain unwarranted constructions put upon the opinions of the Vermont courts by the petition and the inclusion in the petition of irrelevant matters, not properly part of, or contradicted by, the record, no federal question is involved, because Vermont may regulate, limit and restrict the exercise of the power of eminent domain by the petitioner, a foreign corporation, provided its requirements are consistent with federal law. This Vermont may do in a particular case even though the Federal Power Commission has not previously assumed jurisdiction.

HERE NO FEDERAL QUESTION IS INVOLVED.

The Vermont Public Service Commission exists only by virtue of local statutory law and its jurisdiction may be limited in any way which does not conflict with the Federal Power Act. The requirement of a license from the Federal Power Commission in appropriate cases by Vermont law, 30 V.S.A. §111, (R. 144a) is wholly consistent with the Federal Power Act. Therefore, since it is established that Clyde River is navigable, the question of whether the petitioner could condemn in a state tribunal without a license is a question of state law, and in no sense a federal question.

ARGUMENT

I.

IN THE ABSENCE OF A LICENSE FROM THE FEDERAL POWER COMMISSION, THE VERMONT PUBLIC SERVICE COMMISSION HAD NO JURISDICTION OF THE EMINENT DOMAIN PROCEEDINGS INSTITUTED BY PETITIONER IN CONNECTION WITH A PROJECT INVOLVING NAVIGABLE WATERS.

A. Such is the law of Vermont as established by judicial decisions.

Citizens Utilities Company v. *Prouty* (R. 149a);

In *Bellows Falls Hydro-Electric Corp.*, 114 Vt. 443, 47 A. 2nd 409 (1946) as in the present case, there was no question about the navigability of the Connecticut River, of which fact the Vermont Court had taken judicial notice prior to the enactment of the Federal Power Act..

Boutwell v. *Champlain Realty Co.*, *supra*, at 89 Vt. 86.

There the Vermont Supreme Court, wholly on its own initiative and without any suggestion from the parties or their counsel, took judicial notice of the long recognized and notorious navigability of the Connecticut River and determined that the Public Service Commission could have no jurisdiction whatever to issue a certificate of public good with respect to a power project on a navigable river.

Thus in Bellows Falls the Court said:

"While none of the briefs filed in this case makes any mention of the provisions of the Federal Power Act, 16 U.S.C.A. §791a et seq., yet this Court is bound to take judicial notice of all provisions of that Act which apply to the subject matter of the petition. *Bouchard* v. *Central Vt. Ry. Co.*, 87 Vt. 399, 401, 89 A 475, LRA 1915 C 33. Section 23 (b) of that Act states as follows:

"'It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate or maintain any dam, across, along, or in any of the navigable waters of the United States, . . . except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. . . .'"

The Vermont Court then decided upon the authority of the Iowa Case, *First Hydro-Electric* v. *F. P. C.* 328 U. S. 152, 90 L. ed. 1143, that the Public Service Commission was

without authority in law to entertain the petition, in other words, without jurisdiction. It quoted from the First Iowa Case to the effect that "the detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls."

Thus, without undertaking to over rule both *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission* and the Vermont Supreme Court in the Bellows Falls case and in *Citizens Utilities Company* v. *Prouty* (R. 119a, at 129a-131a) as well, the District Court and the Circuit Court of Appeals were required to hold that the Public Service Commission of Vermont did not have jurisdiction of the eminent domain proceedings instituted by Citizens Utilities Company. Petitioner cannot point out any statement in the opinion of the Vermont Supreme Court (R. 119a) that the State Public Service Commission had jurisdiction of Citizens' petition at any time.

That the opinion does not lend the slightest support to such a conclusion, so inconsistent with established law, is clear from its more positive and direct reasoning, thus:

> "The Public Service Commission decided that the petition before it, which asks for the condemnation of land between a power plant and a dam, and over which land penstocks carry water from dam to powerhouse, was governed by the provisions of 30 V.S.A. §111(1)."
>
> "We therefore agree with the Public Service Commission that the dam and powerhouse with which this land is associated must be authorized under Section III (1) of 30 V.S.A." (R. 123a).
>
> * * * * * * * * *
>
> "A private corporation has no right to eminent domain in the absence of a delegation of such power to it from the sovereign by virtue of constitutional or statutory provisions. 29 C.J.S. Eminent Domain, p. 12 See *George* v. *Consolidated Lighting Co.*, 87 Vt. 411. The statutory provision of 30 V.S.A. §111(1) grants the right of eminent domain to a private corporation before the

Public Service Commission provided that such corporation has a certificate of public good from the State, or a license from the Federal Power Commission." (R. 128a)

* * * * * * * * *

"It must therefore follow that it is without jurisdiction to exercise the power of eminent domain by virtue of a certificate of public good, for the power of eminent domain is subordinate to, and dependent upon, the license to maintain the facility for which the land sought is to be condemend."

That the Federal Power Act has taken away from the states the power of control over navigable and other waters subject to the power of Congress is clear from the language of the act itself, its history and judicial interpretation.

With the enactment of the Water Power Act, 16 USCA §791, June 10, 1920, the Congress entrusted and delegated to the Federal Power Commission its constitutional power of control over all navigable waters capable of use for interstate and foreign commerce and the tributary waters and streams, the use, operation or control of which could affect the interests of interstate or foreign commerce.

First Iowa Hydro-Electric Co-op. v. *Federal Power Commission, supra.*

Tuscarora Nation v. *Power Authority of State of New York*, 257 F. 2nd, 885, 894, Cert. Den. 358 U.S. 841, 3 L. ed. 2nd 76, 79 S. Ct. 66, rehearing denied 360 U.S. 923, 3 L. ed. 2nd 1538;

United States v. *Appalachian Electric Power Company*, 311 U.S. 377, 424-428, 85 L. ed. 243;

The Clyde River then was, just as it is today and ever since has been, such a tributary. There has been no change in that respect since 1920. It is the same river in every way, a principal tributary of Lake Memphremagog, an international body of recognized navigable water.

Important for consideration here are certain consequences of the Federal Power Act. Certainly no state legislature can pass valid laws nullifying or inconsistent with any part of the Federal Power Act. State courts and administrative tribunals are bound to respect and give effect to its provisions. It is a part of the Supreme Law of the Land. U.S. Constitution Article VI, §2.

By it Congress bestowed upon licensees of the Federal Power Commission and upon licensees alone, the privilege of exercising the sovereign power of eminent domain either in the federal district courts or in the state courts.

16 U.S.C.A. §814;
Tuscarora Nation of Indians v. *Power Authority of State of N. Y., supra;*
State of Missouri ex rel Camdem County v. *Union Elec. Light & Power Co.*, 42 F. 2nd 692, 698.

Another provision of the Federal Power Act §23, 16 USCA §817 (R. 142a) made it unlawful, for the purpose of developing electric power, to operate or maintain any dam, water conduit, power house or other works incidental thereto across, along, or in any of the navigable waters of the United States without a license granted pursuant to the Act, and authorized the construction of such project works in compliance with state laws, *only* upon a failure by the Federal Power Commission after due hearing to find that the interests of interstate or foreign commerce would be affected. Otherwise construction, maintenance or operation of such dam or other project works is prohibited without a license.

That Congress has pre-empted the entire regulatory field and has granted exclusive power to the Federal Power Commission over navigable waters is clear from the Federal Power Act as a whole and emphatically demonstrated by the following sections of that Act: 16 U.S.C.A. §§796, 797 (e), 803, 804, 814, 817.

The saving clause at the very end of §23 of the Federal Power Act, 16 U.S.C.A. 817, even more than §27, 16 U.S.C.A. §821, shows that state laws and state jurisdiction are super-

seded unless specifically protected from supersedure by particular exceptions in the act itself.

First Iowa Hydro-Electric Coop. v. *Federal Power Commission, supra.*

Section 23 is therefore "thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that in those fields where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course."

Id. 176.

"The detailed provisions of the Act providing for the federal plan of regulation, leave no room or need for conflicting state controls."

Id. 181.

By its finding that the Respondents' land is situated upon a navigable stream, the Vermont Supreme Court necessarily decided that any authorization for the maintenance and operation of the project is within the exclusive jurisdiction of the Federal Power Commission.

Federal Power Commission v. *Oregon*, 349 U.S. 435, 446, 99 L. Ed. 1215;

The eminent domain petition was for this very reason outside the jurisdiction of the Vermont Public Service Commission at the time of its filing.

Pre-emption of the field of control over navigable waters and their tributaries by Congress has suspended the power of state tribunals and a state administrative board does not have any jurisdiction even though the particular matter sought to be administered by the state board has not been taken up by the Federal Agency.

La Crosse Tel. Corp. v. *Wisconsin Employment Relations Board*, Wis., 336 U.S. 18, 24, 26, 93 L. Ed. 463;

Bethlehem Steel Co. v. *New York State Labor Relations Board*, N. Y., 330 U.S. 767, 773, 776, 91 L. Ed. 1234;

Oregon-Washington RR. & Navigation Company v. *State of Washington*, 270 U.S. 87, 102, 70 L. Ed. 482;

Hood & Sons v. *DuMond*, 336 U.S. 525, 543-545;

State Board of Ins. v. *Todd Ship Yards Corp.*, 370 U.S. 451, 456, 8 L. Ed. 2nd 620;

The foregoing principles and the holding of the Vermont Supreme Court that the State Commission had no jurisdiction of the eminent domain proceedings because the petitioner possessed no license, certificate of public good or other authorization entitling it to proceed, are by no means novel.

The rule that there can be no condemnation involving federal waters without the consent of Congress is older than the Federal Power Act itself.

Minnesota Canal & Power Company v. *Pratt*, 101 Minn. 197, 112 N. W. 395.

That was a condemnation case. It was there held under Section 9 of the Rivers and Harbors Act, now 33 U.S. Code §401, that a public service corporation cannot exercise the power of eminent domain in furtherance of an enterprise affecting navigable waters, without first having obtained the approval of the Federal Government.

It therefore follows that no tribunal either federal or state has any jurisdiction to further by eminent domain proceedings the maintenance and operation of a project forbidden by §23 of the Federal Power Act, 16 U.S.C.A. §817. Moreover, the power of eminent domain is granted only to licensees. 16 U.S.C.A. §814.

Hence, the courts below were required to hold the Vermont Public Service Commission never had jurisdiction

of the eminent domain proceedings for the reason that the Petitioner lacked the requisite federal license.

> *Niagara Falls Power Company* v. *Federal Power Commission*, 137 Fed. 2d 787, 791, certiorari denied, 320 U.S. 815.

There, the Power Company relied upon the fact that at the time it applied for a federal license, it already had a permit issued by the State of New York. L. Hand, Judge, rejected this contention and held that no prescription could run against the United States and that the State's permit being beyond its power did not give the Company any right to seize upon the energy of the nation's streams, or to impair their navigability.

Judge Hand remarked—"It would have been a groundless compunction which should have protected 'permits,' 'rights of way,' or 'authority' granted by municipalities or states." * * * "What equitable claim then has a company which relies upon the grant by a state of something beyond its power? What standing does a state's license give it to seize upon the energy of the nation's streams or to impair their navigability?"

There is much more authority in addition to the statute, 16 USCA §814, demonstrating the necessity for a license.

> "Authorization of this project, therefore, is within the exclusive jurisdiction of the Federal Power Commission, unless that jurisdiction is modified by other federal legislation."
>
> *Federal Power Commission* v. *State of Oregon*, 349 U.S. 435, 445, 99 L. ed. 1215.

> " 'The licensee by virtue of section 814 becomes vested with the governmental power of eminent domain.' "
>
> *Tuscarora Nation* v. *Power Authority of State of New York*, 257 F. 2nd. 885, 894, cert. den.

358 U.S. 841, 3 L. Ed. 2nd 76, 79 S. Ct. 66, rehearing denied 360 U.S. 923, 3 L. ed. 2nd 1538, 79 S. Ct. 1431.

". . . a license is a pre-requisite in that water rights under state law in a navigable stream may not be exercised without one; . . ."

Niagara Mohawk Power Corp. v. *Federal Power Commission*, 202 F. 2nd, 190 at 207, affirmed 347 U.S. 239, 98 L. ed. 666, 74 S. Ct. 487.

"Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license."

United States v. *Appalachian Electric Power Company*, 311 U.S. 377, 424, 85 L. ed. 243, 61 S. Ct. 291.

None but licensees are authorized by §21 of the Federal Power Act to exercise the right of eminent domain.

16 USCA §814.

The Federal Power Act applies to dams constructed before its passage. It was so held in *Wisconsin Public Service Commission* v. *Federal Power Commission*, 147 F. 2d 743. There "the utility corporation makes the point that since authority to construct and maintain the dam had been granted by the State of Wisconsin, it constituted a permit for the reconstruction of the dam and the Commission was without power to require the corporation to take out a license under the Federal Power Act." This contention was rejected by the Court because to accept it would be to disregard the plain language of Section 23 of the Act, 16 U.S.C. §817.

B. Applicable statutes of Vermont deprived the Public Service Commission of Jurisdiction over Citizens' Petition because petitioner lacked any authority to condemn.

The statutes, to this effect and upon which the Vermont Supreme Court (R. 123a; 130a) in *Citizens Utilities Company v. Prouty et al*, the District Court (R. 81a) and the Circuit Court of Appeals (Appx A 7a) all relied, are set forth in the various appendices of the parties, especially 30 V.S.A. §111(1), formerly Section 9333 of the Vermont Statutes of 1947 (R. 144a) and 30 V.S.A. §115. (Rs' Appx. 7a).

The jurisdictional basis for action by the State Commission was absent because of the petitioner's failure to invoke and secure the necessary authority. The statutory law cannot be avoided or dispensed with by contract and the courts are bound to see that it is observed before private property is taken by eminent domain.

Thus, the opinion of the Vermont Supreme Court in *Citizens Utilities Company v. Prouty, et al*, said:

> "The report also states that the petitioner does not have the license under the Federal Power Act which it was ordered to obtain by the Federal authorities." (R. 123a)

> "The Petitioner has no certificate of public good in the instant case, * * *" (R. 124a)

These facts are beyond dispute. At the same time, Citizens Utilities Company has strenuously, albeit unsuccessfully, resisted the requirements of the Federal Power Act and all efforts of the Federal Power Commission to secure compliance. (R. 81a; Rs' Appx. 6a).

Yet, the navigability of the Clyde River has been an established fact from earliest times. (Appendix B, 17a-18a).

Of particular importance here is the fact that the War Department reported to the House of Representatives in April, 1826, on the feasibility of improving the Clyde River as part of a proposed waterway development extending from Lake Memphremagog to the Connecticut River.

II.

PETITIONER'S REASONS FOR GRANTING WRIT ARE NOT VALID.

1. There has been no retro-active application of any order of the Federal Power Commission.

Neither the Circuit Court of Appeals, the District Court nor the Vermont Supreme Court in *Citizens* v. *Prouty* has made any decision giving retro-active effect to the assumption of jurisdiction by the Federal Power Commission. There is no statement in the opinion of any one of these courts that they are applying the Federal Power Commission order retroactively. Construed as a whole, none of the opinions purport so to do. The adverb "retroactively" which is employed by Petitioner to set up a false premise is significant only because of its complete absence from the opinions of these courts. Moreover, the fact of navigability is the basis of the decision of the Vermont Supreme Court, for it said:

> "In the instant cases the facility of the private corporation for which land is sought to be obtained by eminent domain is upon a navigable stream." (R. 129a).

This determination is res adjudicata. Hence, the rationale of the Circuit Court of Appeals is that under Vermont law the Public Service Commission did not have jurisdiction in 1956 for the reason that the project in question was situated upon navigable waters of the United States.

Petitioner argues that the State Public Service Commission once had jurisdiction and "retained" it until the Federal Power Commission acted to assert its own jurisdiction. In other words, Petitioner says the state commission had jurisdiction until lost by the happening of a condition subsequent, namely, assumption of jurisdiction upon the part of the Federal Power Commission. The fallacy of this proposition is of course obvious from the language of

§23 which gives permission to proceed upon compliance with state laws, though only when the Federal Power Commission after hearing does not find that the interests of interstate or foreign commerce would be affected. Otherwise, Citizens "*shall not construct, maintain or operate such dam or other project works until it shall have applied for and received a license* under the provisions of this chapter." (Italics Supplied).

16 U. S. C. A. §817.

Decisive, however, is the fact of navigability determined by the Vermont Supreme Court. It leaves no room for the exercise of any state authority, because the federal law and the jurisdiction of the Federal Power Commission occupy the entire field, unless permission is granted pursuant to Section 23 of the Federal Power Act, 16 U.S.C.A. §817, to proceed upon compliance with state laws. Otherwise, by the first sentence of Section 23, it is unlawful to operate or maintain any dam, water conduit, power house or other project works across, along or in any of the navigable waters of the United States.

The importance of the prohibitions contained in §23 of the Federal Power Act has been twice recognized and emphasized by the Vermont Supreme Court. (R. 125a; 129a)

In re Bellows Falls Hydro-Electric Corp., *supra*.

2. The second question of the Petition is based on the utterly false premise that the highest court of the forum state said that jurisdiction in the Public Service Commission "was once present."

There is no such statement in the opinion of the Vermont Supreme Court and no such notion is implied.

3. The argument that a state agency, which decrees condemnation, and a utility, which acquires property rights thereby, act completely at their peril is absurd.

Citizens Utilities Company, as the opinion of the Circuit Court of Appeals points out (Petitioner's Appendix 7a), could not have been blind to its obligations under §23 of the Federal Power Act, 16 U.S.C.A. §817.

Moreover, as the Circuit Court of Appeals well said (Petitioner's Appendix 7a) "The decision in re Bellows Falls Hydro-Electric Corp., *supra*, had been upon the books for some years."

It also was bound to know the statutory law of Vermont which in case of riparian property of the nature here involved required that the petitioner in condemnation proceedings possess either "a certificate of public good authorizing the project as herein required, or a license from the Federal Power Commission." (R. 144a).

30 V. S. A. §§111 and 115.

Thus, the answer to petitioner's contention about "the existence and scope of a state's power of eminent domain over land abutting possibly navigable waters, prior to any determination of navigability by the Federal Power Commission," is that the petitioner has not proceeded in accordance with state law and is in no position to raise the question, now that its proceedings in the state tribunals have been definitely terminated and dismissed.

No property rights of petitioner are at stake. The question is moot. On the other hand, the property of respondents ought to be protected against unauthorized appropriation contrary to state law. (R. 128a).

George v. *Consolidated Lighting Co.*, 87 Vt. 411, 89 A. 635.

4. Petitioner's contentions based on Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359 are unsound:

That proceeding involved only issues of valuation which were held to have been properly decided in accordance with state law under the particular circumstances of that case. No question or issue of jurisdiction was raised or presented

in any way, as petitioner freely admits. At any rate, the petitioner in Grand River had filed with the Federal Power Commission a declaration of intenton December 15, 1937, (more than a year previous to instituting condemnation proceedings in February 1939) and evidently applied for a license from the Federal Power Commission as a result of that Commission's decision dated February 28, 1939, which however was not granted until July 26, 1939; quite a contrast with the conduct of the petitioner here, Citizens Utilities Company. At any rate, petitioner is relying upon a very slender reed when it designates a point not raised in Grand River as a "teaching" to be absorbed by this court.

Reference in the context of this case to *Yoder* v. *Nu-Enamel Corp.*, 117 F. 2d 188, 189, lends no support to the contentions of the petitioner. The local law in question is embodied in the Vermont Statutes and the decisions of the Vermont Supreme Court. It is local law of that quality which should be followed upon the authority of *Yoder* v. *Nu-Enamel*, and not an irrelevant *dictum*.

CONCLUSION

The petition should be denied, because the Vermont Public Service Commission, by state statute and judicial decision, had no jurisdiction of condemnation proceedings involving riparian lands situate upon navigable waters of the United States, when brought by a petitioner lacking a license from the Federal Power Commission, and, hence, without the right to institute such proceedings given by §21 of the Federal Power Act, 16 U.S.C.A. §814, to licensees and to licensees alone.

Certainly this case is not "of such imperative public importance as to justify deviation from normal appellate processes and to require immediate settlement in this court" as required by United States Supreme Court Rule #20.

Respectfully submitted,

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